Supreme Court, U.S.
FILED
MAR 1 2002
CLERK

No. 01-1079

IN THE
Supreme Court of the United States

SHEILA K. MONTGOMERY,

Petitioner,

v.

STATE OF MARYLAND, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

ANDREW H. BAIDA*
Solicitor General
200 St. Paul Place
Baltimore, Maryland 21202
(410) 576-6318

SCOTT S. OAKLEY
Assistant Attorney General
6776 Reisterstown Road
Baltimore, Maryland 21215
(410) 585-3073

*Counsel of Record

Attorneys for Respondents

QUESTIONS PRESENTED

1. Did the court of appeals correctly affirm the dismissal of petitioner's claim alleging a violation of the Family and Medical Leave Act ("FMLA") when she alleged that her reassignment was planned before she took leave and was due to a non-leave related grievance she filed, and the record demonstrated that her positions both before and after she took leave were in the same classification at the same grade and increment levels?

2. Did the court of appeals correctly hold that petitioner's FMLA claim is barred by Eleventh Amendment immunity when respondents asserted immunity after the district court concluded that the FMLA is not "appropriate legislation" under Section 5 of the Fourteenth Amendment, and petitioner has never contested the merits of that conclusion?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 7

I. THE FMLA CLAIM DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION 8

II. THE COURT OF APPEALS' DECISION ON THE MERITS OF THE FMLA CLAIM MAKES IT UNNECESSARY TO DECIDE THE IMMUNITY QUESTION THAT THE PETITIONER RAISES 13

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

American Nurses' Association v. Illinois, 783 F.2d 716 (7th Cir.1986) 9

Brown v. J.C. Penney Corp., 924 F.Supp. 1158 (S.D.Fla. 1996) 12

Conley v. Gibson, 355 U.S. 41 (1957) 9

Conn v. GATX Terminals Corp., 18 F.3d 417 (7th Cir.1994) 10

Edelman v. Jordan, 415 U.S. 651 (1974) 4

Estate of Porter v. Illinois, 36 F.3d 684 (7th Cir.1994) 14

Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459 (1945) 4

Gunderson v. Neiman-Marcus Group, Inc., 982 F.Supp. 1231 (N.D.Tex. 1997) 12

Gunnell v. Utah Valley State College,
152 F.3d 1253 (10th Cir.1998) 9
Gwinn Area Schools v. State of Michigan,
741 F.2d 840 (6th Cir.1984) 14
Kohls v. Beverly Enterprises Wisconsin, Inc.,
259 F.3d 799 (7th Cir.2001) 8
Lapides v. Board of Regents of University System of Georgia, 122 S.Ct. 456 (2001) 13,14
Newfield House, Inc. v. Massachusetts Dept. of Public Welfare, 651 F.2d 32 (1st Cir.), *cert. denied*, 454 U.S. 1114 (1981) 14
O'Connor v. PCA Family Health Plan, Inc.,
200 F.3d 1349 (11th Cir.2000) 9
Santos v. Knitgoods Workers' Union, Local 155,
252 F.3d 175 (2nd Cir.2001) 9
Silver v. Baggiano, 804 F.2d 1211 (11th Cir.1986) 14
Sutton v. Utah State School for the Deaf and Blind,
173 F.3d 1226 (10th Cir.1999) 14
Swierkiewicz v. Sorema N.A., 122 S.Ct. __,
2002 WL 261807 (2002) 9,11
Watkins v. J & S Oil Co., Inc.,
164 F.3d 55 (1st Cir.1998) 12
Wisconsin Department of Corrections v. Schacht,
524 U.S. 381 (1998) 4

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

U.S. Const. amend. XI ..... *passim*
U.S. Const. amend. XIV 3

29 U.S.C. § 2614(a)(1)(A) 11
29 U.S.C. § 2614(a)(1)(B) 11
29 U.S.C. § 2614(a)(3)(B) 8
29 C.F.R. § 825.215(a) 12
29 C.F.R. § 825.215(f) 12

STATEMENT OF THE CASE

Petitioner Sheila Montgomery is currently employed by Maryland's Eastern Correctional Institution ("ECI") as a secretary, classified under the State's Personnel Management System as an Administrative Aide Stenographer, in the facility's maintenance department. (App. 13a.)[1] Prior to taking extended leave in September 1999, Ms. Montgomery was assigned to the Warden's office as a secretary, under the same classification of Administrative Aide Stenographer. (*Id.*) In that capacity, she performed secretarial and administrative duties for the Warden. (*Id.*) In June 1999, ECI's Warden was replaced temporarily by Assistant Warden George Kaloroumakis. (Complaint ¶ 8.) Upon Assistant Warden Kaloroumakis's installment as Acting Warden, Ms. Montgomery alleged that her work environment changed dramatically and that she "for the first time experienced difficulties working for her immediate supervisor." (*Id.*) Ms. Montgomery alleged that Acting Warden Kaloroumakis treated employees in the Warden's office with little or no respect and "maintained an office environment that was hostile, stressful and full of personal friction." (*Id.*) Ms. Montgomery and her co-workers allegedly attempted without success to "induce" Acting Warden Kaloroumakis "to treat them in a more professional, considerate manner . . . ." (Complaint ¶ 9.)

Ms. Montgomery's employment situation purportedly became so unpleasant that, on September 9, 1999, she filed a grievance with the State of Maryland Personnel Management System. (*Id.*) The grievance alleged that "the derogatory demeanor and belittling comments of the Acting Warden (George Kaloroumakis) . . . create a hostile work environment which is detrimental to [Ms. Montgomery's]

---

[1] References to "App." are to the Appendix to the Petition for Writ of Certiorari.

career . . . and creates a hostile work place." (Complaint Exhibit A.) Petitioner asked "to be given the opportunity to perform [the] functions of her classification" and for the State to provide "meaningful conflict resolution" to resolve the situation with Acting Warden Kaloroumakis. (*Id.*)

On September 22, 1999, Ms. Montgomery commenced a previously scheduled extended medical leave for foot surgery. (Complaint ¶ 10.) While she was on leave, Robert Kupec was installed as ECI's new Warden. (Complaint ¶ 10.) Kaloroumakis returned to his position as Assistant Warden. (*Id.*) Upon her return to work on November 8, 1999, Ms. Montgomery was notified that she had been transferred to a secretarial position in the ECI maintenance department "at the same pay grade and increment level" that she had in the Warden's office. (Complaint Exhibit B.)

Following her transfer, Ms. Montgomery participated in a meeting with her supervisors from the Warden's office and the ECI personnel officer, as well as a meeting with a representative from her labor organization and Assistant Warden Kaloroumakis. (Complaint ¶¶ 12-13.) As Ms. Montgomery alleged in the section of her complaint entitled "Facts Giving Rise to this Action," at both meetings it was made clear that her transfer from the Warden's office had been anticipated prior to Warden Kupec's arrival at ECI, and that the transfer was the result of concerns that management at ECI had about the atmosphere in the Warden's office and a lack of professionalism and trustworthiness on Ms. Montgomery's part. (*Id.*)

While she remained classified in the same Administrative Aide Stenographer position, Ms. Montgomery was dissatisfied with her current employment as a secretary in the maintenance department. (Complaint ¶ 14.) According to Ms. Montgomery, her new duties were "the simplest, most menial of clerical functions: answering

the phone, taking messages, typing simple correspondence, and the like." (*Id.*) In addition, she alleged that her physical surroundings allegedly compared unfavorably with those in the Warden's office, as she now shared her work area with another employee. (*Id.*) Ms. Montgomery alleged that her transfer resulted in "significant emotional distress accompanied by physical symptoms" and the need for "medication and professional counseling." (Complaint ¶ 15.)

Ms. Montgomery brought suit in the United States District Court for the District of Maryland claiming that respondents (collectively "the State") violated the Due Process Clause of the Fourteenth Amendment and the FMLA. The State moved to dismiss Petitioner's complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. The State raised its immunity from suit under the Eleventh Amendment to the United States Constitution as a defense to both counts of the complaint, asserted that the conduct of the individual defendants was protected by qualified immunity, and also argued that Ms. Montgomery's transfer did not violate either the Fourteenth Amendment or the FMLA.

After filing the motion to dismiss, the State wrote a letter to the district court to withdraw, on behalf of all defendants, the Eleventh Amendment immunity defense with respect to Ms. Montgomery's FMLA claim. (App. 3a.) The district court subsequently issued a decision dismissing the complaint. (App. 15a.) Notwithstanding the State's withdrawal of its Eleventh Amendment immunity defense, the district court ordered the dismissal of the FMLA claim, noting its "duty not to enforce unconstitutional statutes," and holding that "the FMLA, as applied to the states, is clearly unconstitutional under the Eleventh Amendment, because it allows the states to be sued in a federal court without their consent, in the absence of a constitutionally-adequate

abrogation of that immunity by Congress." (*Id.*) The court also found that the State's withdrawal of the Eleventh Amendment immunity defense with respect to the FMLA claim did not "amount to a constitutionally significant consent to suit or other waiver of sovereign immunity by the State of Maryland under the Eleventh Amendment." (App. 16a.)

Ms. Montgomery subsequently appealed the district court's dismissal of her FMLA claim, which the court of appeals affirmed. Stating that "[t]he district court failed to recognize the discretion afforded it by [*Wisconsin Department of Corrections v.*] *Schacht*[, 524 U.S. 381 (1998)]" (App. 4a), the court of appeals observed that "[w]hen a state clearly contemplates the defense of sovereign immunity and then affirmatively and unequivocally decides to withdraw that argument, a district court errs in considering the issue *sua sponte*." (*Id.*) Noting that the State had invoked the defense of immunity in Ms. Montgomery's appeal, however, the court stated that it had "the discretion to consider Maryland's assertion of immunity even though the Attorney General attempted to withdraw it below." (App. 5a.) The court of appeals observed that the defense "sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court" (App. 6a) (quoting *Edelman v. Jordan*, 415 U.S. 651, 678 (1974)), that it has been considered "even though urged for the first time in this Court" (App. 6a) (quoting *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 467 (1945)), and that "a rule that prevented an appellate court from considering the defense *sua sponte* would impair the important sovereign interest that the Eleventh Amendment protects. Thus, the fact that Maryland did not assert the immunity defense below does not preclude the state from asserting it now." (App. 6a.)

The court of appeals also rejected Ms. Montgomery's contention that the State waived its Eleventh Amendment immunity by withdrawing the defense from its motion to dismiss, stating that, under Maryland law, "the Attorney General may not dispositively waive the defense of sovereign immunity on behalf of the state," and "[i]t is undisputed that Maryland's legislature has not authorized FMLA suits against the state nor has it allocated funds to satisfy FMLA judgments." (App. 7a.) Concluding that "there is the important interest of not having private individuals impose a levy on state treasuries without any consent by the state itself," and that there is also "a risk of judicially enforcing a private right of action which may rest upon an invalid exercise of Congressional authority" (App. 8a), the court determined that it might "abridge state sovereignty by failing to respect a claim of immunity in the face of the state's unequivocal assertion of it." (*Id.*)

Having concluded that it had the authority to address the State's immunity defense and that the defense had not been waived, the court of appeals noted that it recently "became the seventh federal court of appeals to hold that the FMLA does not abrogate the sovereign immunity of the states." (App. 9a) (citing cases). The court thus affirmed the district court's dismissal of Ms. Montgomery's claim "[b]ecause the FMLA does not validly abrogate Maryland's Eleventh Amendment immunity." (*Id.*)

Rather than rest its decision solely on immunity grounds, however, the court identified three alternative bases for rejecting Ms. Montgomery's FMLA claim on the merits. First, noting that "Montgomery has not alleged that she suffered actual monetary damages, either in lost wages or in the cost of providing care," the court observed that "her demand for monetary relief appears to be rooted solely in her claim for emotional damages." (App. 11a.) Stating that

"[t]he FMLA text nowhere provides, however, for recovery of damages for emotional distress" (*id.*), the court held that Ms. Montgomery's suit for damages "was properly dismissed even absent the Eleventh Amendment bar." (App. 12a.)

Second, the court stated that, while the FMLA requires employers to restore an employee returning from FMLA-related leave to either the same position or one with "[e]quivalent terms and conditions of employment" (*id.*), Ms. Montgomery's classification, "pay grade and increment level remained the same" (App. 13a), and she "received a four percent raise within two months of being transferred" and had "not lost any job security." (*Id.*) The court thus held that Ms. Montgomery failed to state a violation of the FMLA because her "complaint focuses on precisely the sorts of de minimus, intangible, and unmeasurable aspects of a job that the [FMLA] regulations specifically exclude." (App. 12a.)

Third, the court stated Ms. Montgomery's "complaint demonstrates that her change in status was not related to her assertion of rights under the Family and Medical Leave Act" but rather that it arose when, "[a]ccording to her own summary of her complaint, the Defendants transferred her 'to retaliate against her for filing a grievance and otherwise complaining of her work conditions.'" (App. 14a n.2.) The court thus held that, "[a]s it is evident that Montgomery would have been transferred even if she had not taken medical leave, she has no right to be returned to her pre-leave position." (*Id.*)

REASONS FOR DENYING THE WRIT

The petition should be denied because the court of appeals' decision conforms with prior decisions of this Court and similar decisions of other federal courts, and gives rise to no error that justifies the exercise of this Court's discretionary jurisdiction. The court of appeals did nothing extraordinary in applying well-settled pleading principles to Ms. Montgomery's allegations and concluding, on the basis of those allegations, that her FMLA claim was properly dismissed on the merits. That conclusion is supported by three independent grounds, one of which the petition does not even discuss, namely, that Ms. Montgomery did not suffer any damages warranting relief under the FMLA. None of those grounds involves any issue, much less one that is novel or exceptional, on which the lower federal courts require this Court's guidance.

There is thus no need to address the immunity ground that the court of appeals cited as yet another reason for affirming the district court's decision, because the resolution of that issue would be a strictly academic endeavor that would not change the disposition of this case. Just as significantly, even if the court of appeals had rejected Ms. Montgomery's FMLA claim solely on the basis of Eleventh Amendment immunity, the unique facts of this case make it extremely unlikely that review of the court's decision will have any effect beyond this litigation. Indeed, other than the courts below, no court has even addressed the unusual situation presented here in which a district court decided a case on immunity grounds after the State defendant withdrew that defense from its motion. Certiorari is unwarranted because the decision of the court of appeals rests on a factual scenario that has not arisen before and, in all probability, will not be repeated in the future.

I. THE FMLA CLAIM DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The court of appeals set forth three reasons, none of which warrants review, in holding that the allegations of the complaint make clear that Ms. Montgomery failed to state a violation of the FMLA. First, Ms. Montgomery has no right to be restored to the same position she had prior to taking leave because that position was not one "to which [she] would have been entitled had [she] never taken leave." 29 U.S.C. § 2614(a)(3)(B). Ms. Montgomery alleged that her work situation had sharply deteriorated in the months before she took leave, and that the situation became so intolerable that she filed a grievance protesting the "hostile work environment" in the Warden's office to which she was allegedly subjected. (Complaint ¶ 9.) She also alleged that her transfer from the Warden's office to the maintenance department was the result of the grievance she filed through the State Personnel Management System, not the fact that she took leave for foot surgery. (*Id.* ¶¶ 12, 13.) Ms. Montgomery also acknowledged that her transfer out of the Warden's office had been anticipated prior to her taking leave, and that the transfer was apparently the result of concerns ECI management had regarding Ms. Montgomery's professionalism and trustworthiness and the general atmosphere in the Warden's office. (*Id.*)

The complaint thus makes clear that Ms. Montgomery's transfer to the maintenance department was the result of circumstances that were completely independent of her leave. The court of appeals properly affirmed the dismissal of Ms. Montgomery's FMLA claim because the FMLA was not created to prevent employers from taking employment actions that they would have taken regardless of the employee's leave. *See Kohls v. Beverly Enterprises Wisconsin, Inc.*, 259 F.3d 799, 806 (7th Cir.2001) ("Beverly

would have been entitled to fire Kohls for mismanagement and mishandling of funds regardless of whether she had taken leave or not."); *Santos v. Knitgoods Workers' Union, Local 155*, 252 F.3d 175, 179 (2nd Cir.2001) ("Since the termination itself did not violate the FMLA, and since her loss of accrued sick leave was the consequence of termination under her employer's normal policy, Santos suffered no 'loss of any employment benefit' within the meaning of the FMLA."); *O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349, 1354-55 (11th Cir.2000) ("[W]e agree with the district court's ultimate conclusion that the termination of O'Connor during her period of FMLA leave, because it was part of a legitimate RIF, did not violate the statute."); *Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1262 (10th Cir.1998) ("[A]ny reason for terminating Gunnell's employment would not involve the FMLA, and consequently that statute can offer Gunnell no relief.").

In an attempt to manufacture an issue where none exists, Ms. Montgomery argues that "[t]he court's decision violates the fundamental principle of 'notice pleading' and misconceives the rule for construction of a complaint that contains both sufficient general allegations and specific allegations that the court finds insufficient." Pet. at 21. While Ms. Montgomery has no obligation to set forth in her complaint anything other than "sufficient general allegations," *see also Swierkiewicz v. Sorema N.A.*, 122 S.Ct. __, 2002 WL 261807 (2002); *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957), her own authority recognizes that "if the plaintiff, though not required to do so, pleads facts, and the facts show that he is entitled to no relief, the complaint should be dismissed. There would be no point in allowing such a lawsuit to go any further; its doom is foretold." *American Nurses' Association v. Illinois*, 783 F.2d 716, 727 (7th Cir.1986). Although the court concluded that the

complaint in that case should not have been dismissed because it included not only "invalid claims" but also "a valid one," *id.* at 725, the complaint in this case, in the words of the same judge (Posner, J.) who wrote *American Nurses*, is one in which "[t]he plaintiff pleaded [her]self out of court," *Conn v. GATX Terminals Corp.*, 18 F.3d 417, 419 (7th Cir. 1994), as Ms. Montgomery's complaint sets forth no valid claims but only invalid ones.

While Ms. Montgomery contends that the court of appeals' retaliation determination is based on "the now-abandoned Count I of petitioner's complaint," Pet. at 28, the court stated explicitly that, according to Petitioner's "own summary of her complaint," she would have been transferred even had she not taken leave. (App. 14a n.2.) Contrary to Ms. Montgomery's assertion that her retaliation theory is unique to her non-FMLA claim, her FMLA count expressly "incorporated by reference" (Complaint ¶ 19) facts set forth in a prior section of her complaint entitled "Facts Giving Rise to this Action," in which Ms. Montgomery specifically alleged that she filed a grievance prior to taking leave "protesting Deputy Warden Kaloroumakis's creation of a 'hostile work environment'" (*id.* ¶ 9); that upon her return from leave she attended a meeting in which she was told "her reassignment was already 'in the makes'" when the new warden arrived while she was out on leave (*id.* ¶ 12); that several days later she attended another meeting with the new warden, a union representative, "and another office worker who – like Ms. Montgomery – had been transferred out of the Warden's office after complaining about the hostile work environment created by Deputy Warden Kaloroumakis" (*id.* ¶ 13); and that "[a]s a result of Ms. Montgomery's apparently retaliatory exile from a position as administrative aide in the Warden's office to a position as secretary in the maintenance department, she has undergone significant

emotional distress." (*Id.* ¶ 15.) The court of appeals committed no error, much less one deserving of this Court's attention, in carefully resting its ruling on the basis of these allegations, and concluding that Ms. Montgomery had no right under the FMLA to be returned to her pre-leave position when she would have been transferred regardless of whether she took leave.

For this reason alone, there is no reason to remand this case in light of the Court's decision in *Swierkiewicz v. Sorema N.A.*, 122 S.Ct. __, 2002 WL 261807 (2002). While "the Federal Rules do not contain a heightened pleading standard for employment discrimination suits," *id.*, 2002 WL 261807 at *5, a plaintiff nevertheless may, as the United States and EEOC observed in their joint amicus brief in that case, "plead himself out of a cause of action by alleging facts that conclusively foreclose relief." Br. at 10. Review should be denied because that is the situation here.

The second reason that the court of appeals provided in determining that Ms. Montgomery failed to state a violation of the FMLA is also no justification for remanding this case in light of *Swierkiewicz*, as the appellate court decided nothing legally remarkable in concluding that the purported differences between her job assignments were "not of sufficient magnitude, especially given the equivalent pay grade, increment level, and administrative classification, to constitute an FMLA violation." (App. 13a.) The FMLA provides that employees are entitled either to be returned to "the position of employment held by the employee when the leave commenced," or "to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." 29 U.S.C. § 2614(a)(1)(A) and (B). The FMLA does not require, however, an employee's restoration to the exact same

position or a position with identical duties.[2]

Rather, while an "equivalent position" is defined as "one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions," 29 C.F.R. § 825.215(a), the court of appeals in this case held that "[e]quivalent terms and conditions of employment, however, do not require equivalence with respect to 'the de minimus or intangible, unmeasurable aspects of the job.'" (App. 12a) (quoting 29 C.F.R. § 825.215(f)). The court correctly concluded that because Petitioner's pay grade, increment level, classification, and job security remained the same when she returned from leave, the differences she complained about, "such as the alleged reduction in the complexity of her tasks and the sharing of work space" (App. 13a), are "not of such import as to implicate the protections of the governing federal law." (*Id.*)

Ms. Montgomery argues that, "[u]nder the federal rules, there is no requirement that petitioner plead specific details of exactly how her current job fails to be equivalent to her

---

[2] *See, e.g., Watkins v. J & S Oil Co., Inc.,* 164 F.3d 55, 59 (1st Cir.1998) (stating that an equivalent position is one that "is substantially equal or similar, not necessarily identical or exactly the same"); *Gunderson v. Neiman-Marcus Group, Inc.*, 982 F.Supp. 1231, 1238 (N.D.Tex. 1997) (FMLA was not violated where the plaintiff, who had previously been assigned to a cosmetics counter, was restored to a "floater" sales position upon return from her leave because the latter position afforded the plaintiff equivalent pay, benefits, and status); *Brown v. J.C. Penney Corp.*, 924 F.Supp. 1158, 1163 (S.D.Fla. 1996) ("the FMLA does not require that an employee be returned to the exact position that he held prior to embarking on his leave").

previous job," Pet. at 27, but the court of appeals did not commit any error in acting on her decision to do so. Petitioner incorrectly asserts that the court relied on "specific allegations" to "limit the general allegations," *id.*, as the "general allegations" she quotes (*id.* at 26) are actually specific allegations that are part of a series of contentions in the complaint (¶ 14) setting forth in detail how, in Ms. Montgomery's view, the two jobs are not the same. The court of appeals properly concluded that these allegations failed to establish a violation of the FMLA.

Ms. Montgomery does not even address the third reason that the court of appeals provided in dismissing her damages claim under the FMLA. As with the other reasons provided by the court in disposing of that claim, however, the court decided no exceptional question of law in holding that the claim was barred because it was based solely on emotional harm that Ms. Montgomery allegedly suffered, and the FMLA does not provide for recovery of such damages. Petitioner's abandonment of her request for that relief underscores the insubstantial nature of her petition and the absence of any need to grant it.

II. THE COURT OF APPEALS' DECISION ON THE MERITS OF THE FMLA CLAIM MAKES IT UNNECESSARY TO DECIDE THE IMMUNITY QUESTION THAT THE PETITIONER RAISES.

There is no need to address the immunity issue Ms. Montgomery raises, or to hold this case pending the outcome of *Lapides v. Board of Regents of University System of Georgia*, 122 S.Ct. 456 (2001) (No. 01-298), in light of the reasons the court of appeals provided in rejecting her FMLA claim and holding that the complaint was properly dismissed on the alternative ground that it failed to establish an FMLA violation. While the court of appeals had a firm basis for

resolving the immunity question as it did, this Court's resolution of that issue would be a purely academic exercise that would not affect the outcome of this case.

In addition, as evidenced by Ms. Montgomery's failure to identify any case that is remotely similar to the unusual procedural posture of this one, certiorari would not be warranted even if the court of appeals had based its decision on immunity grounds only. Unlike the removal question in *Lapides* over which the federal courts have long been divided,[3] the question in this case – "Whether a state defendant that raises the defense of state sovereign immunity, but then expressly withdraws it, is thereafter barred from reasserting immunity" (Pet. at i) – apparently has never arisen before, as Petitioner has cited no case in which a district court, or a federal appellate court for that matter, has dismissed a complaint on the basis of Eleventh Amendment immunity after the State defendant withdrew that defense. Ms. Montgomery's inability to locate any case like this confirms that this is a unique situation that stands alone, rather than one, as she contends, that "presents a distinct, important, recurring question that has vexed the courts of appeals." Pet. at 13. The federal courts can hardly have been vexed by a question they have not previously been asked to address, much less to decide.

---

[3] *Compare Estate of Porter v. Illinois*, 36 F.3d 684, 691 (7th Cir.1994) (no waiver); *Silver v. Baggiano*, 804 F.2d 1211, 1214-15 (11th Cir.1986) (same); *Gwinn Area Schools v. State of Michigan*, 741 F.2d 840, 846-47 (6th Cir.1984) (same) *with Sutton v. Utah State School for the Deaf and Blind*, 173 F.3d 1226, 1236 (10th Cir.1999) (waiver) *Newfield House, Inc. v. Massachusetts Dept. of Public Welfare*, 651 F.2d 32, 36 n.3 (1st Cir.) (same), *cert. denied*, 454 U.S. 1114 (1981).

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

ANDREW H. BAIDA*
Solicitor General
200 St. Paul Place
Baltimore, Maryland 21202
(410) 576-6318

SCOTT S. OAKLEY
Assistant Attorney General
6776 Reisterstown Road
Baltimore, Maryland 21215
(410) 585-3073

*Counsel of Record

Attorneys for Respondents

March 4, 2002